IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.2671 OF 2006.

Shyam Narayan Pandey. ... Appellant.

Versus.

Brihanmumbai Mahanagarpalika & ors. ... Respondents.

Shri A.Y.Sakhare, Senior Counsel with Shri R.S.Yadav for the Appellant.

Shri J.J.Xavier for the Respondents.

CORAM : ABHAY S.OKA, J.

DATED : 24th January, 2007.

P.C.:

1. Heard the learned Senior Counsel appearing for the Appellant and the learned Advocate for the Respondent. A compilation comprising of the pleadings, copies of documents on record of the suit and the copies of notes of evidence has been filed.

2. The Appellant is the original Plaintiff. The Appellant has challenged in the suit the order dated 14th January 2003 passed by the Assistant Municipal Commissioner of the Respondent-Corporation on the basis of the notice dated 18th August 2001 issued under section 351 of the Mumbai Municipal Corporation 1888 (hereinafter referred to as "the said Act of 1888"). The notice relates to a structure consisting of ground plus mezzanine floor which is more particularly described in the schedule to the notice dated 18th August 2001. The schedule reads thus:

> "Unauthorised construction of structure Ground + Mezzanine floor by ladi coba laid, brick masonary wall and A.C.sheet roof admeasuring 22’-6" x 10’ x Av.ht.14’ (As shown in the sketch."

After considering the reply filed by the Appellant, an order was passed by the Assistant Commissioner of the Respondent-Corporation on 14th January 2003 holding that the unauthorised structure referred to in the notice shall be removed within a period of 15 days. The learned trial Judge dismissed the suit by the impugned judgment and order holding that the Appellant has failed to establish that the suit structure was an authorised structure.

3. The learned Senior Counsel appearing for the Appellant submitted that the order which was made on the basis of the notice under section 351 of the said Act of 1888, the Assistant Municipal Commissioner has held that only the mezzanine floor is unauthorised. He submitted that notwithstanding this finding, an order was passed to remove the entire structure described in the notice. He submitted that the Advocate appearing for the Respondent before the trial Court had conceded before the trial Court that the ground floor structure was not

unauthorised and only the mezzanine floor was unauthorised. He submitted that notwithstanding this concession, the suit has been dismissed in its entirety. He submitted that in so far as the mezzanine floor is concerned, the same can be protected on the basis of the policy of the Respondent-Corporation of regularisation of the mezzanine floors which were in existence as on 15th August 1997.

4. The learned Advocate for the Respondent did not dispute that the ground floor structure is authorised. However, he submitted that the mezzanine floor was completely unauthorised and is not protected by any policy of the Respondent-Corporation.

5. I have considered the submissions. A perusal of the order passed by the Assistant Commissioner on 14th January 2003/28th January 2003 shows that only the mezzanine floor is held to be unauthorised and it is held that the mezzanine floor is liable to be demolished. The order specifically records that after scrutiny of documentary evidence there is no dispute regarding the ground floor portion of the said structure. Even in the impugned judgment, the learned trial Judge has recorded the concession made by the Advocate appearing for the Respondent that the ground floor structure was authorised. Thus it is obvious that

the ground floor structure cannot be demolished on the basis of the impugned notice and the impugned order.

6. In so far as the mezzanine floor is concerned, there is no material on record to show that the mezzanine floor was in existence on 15th August 1997. The Appellant/Plaintiff has not come out with any specific case as regards the date on which the mezzanine floor was constructed. There not even a prima-facie material on record which will indicate that the mezzanine floor was in existence on 15th August 1997. Therefore, the policy of regularisation of mezzanine floor adopted by the Respondent-Corporation cannot be applied to the mezzanine floor in this case. Therefore, no relief can be granted as regards the mezzanine floor.

7. Hence the Appeal succeeds in part and the following order is passed:

i) The impugned Judgment and decree is set aside. There will be a decree in terms of prayer clause (a) of the plaint which will relate only to the structure of ground floor described in notice dated 18th August 2001.

ii) The Respondent-Corporation is free to

demolish the mezzanine floor described in Notice dated 18th August 2001.

iii) There will be no order as to costs throughout.

8. At this stage, the learned Advocate for the Appellant prays for protection for a limited period as regards the mezzanine floor. The said prayer is opposed by the Advocate for the Respondent. Considering the facts and circumstances of the case, the mezzanine floor shall not be demolished for a period of two months from today.

Judge.